MEETING
EXPANDED NATURAL RESOURCES INTERIM COMMITTEE
September 2, 2004
1:00 p.m. to 4:30 p.m. Boise City Hall,
City Council Chambers, 3rd Floor, 150 N. Capitol Blvd., Boise, Idaho

The meeting was called to order by Cochairman Representative Dell Raybould at 1:00 p.m. Other committee members present were Cochairman Senator Laird Noh, Senator Don Burtenshaw, Senator Stan Williams, Senator Dean Cameron, Senator Joe Stegner, Senator Skip Brandt, Senator Clint Stennett, Senator Bert Marley, Representative Bert Stevenson, Representative JoAn Wood, Representative Mike Moyle, Representative Scott Bedke, Representative George Eskridge, Representative Jack Barraclough, Representative Wendy Jaquet and Representative Chuck Cuddy. Pro Tem Senator Robert Geddes was absent and excused. Ad Hoc members present were Senator Gary Schroeder, Senator Tom Gannon, Senator Brent Hill, Senator Marti Calabretta, Representative Darrell Bolz, Representative Maxine Bell, Representative Doug Jones, Representative Tim Ridinger, Representative Eulalie Langford, Representative Larry Bradford, Representative Lawerence Denney and Representative Pete Nielsen. Senator John Andreason, Senator Brad Little, Senator Shawn Keough, Senator Dick Compton, Representative Wayne Meyer and Representative George Sayler were absent and excused. Non-committee legislators present were Representative Frances Field. Legislative Services Staff members present were Katharine Gerrity, Ray Houston and Toni Hobbs.

Others present included Rex Minchey, Jerome Cheese Co.; John Rosholt, Twin Falls Canal Company/North Snake Canal Company; Andrea Mihm, Clear Springs; Maria Ninicucci, Boise City Parks and Recreation; Randy MacMillan and Larry Cope, Clear Springs Foods; Bruce Smith; Russell Westerberg, PacifiCorp; Dar Olberding, IGPA; Neal Powell, Idaho Ground Water Appropriators; Lynn Carlquist and Mike Faulkner, North Snake Ground Water District; Leonard Beck, State Water Board; Dick Rush, Idaho Association of Commerce and Industry; Lloyd Knight, Idaho Cattle Association; Betsy Russell, The Spokesman Review; Layne Bangarter, Senator Crapo's Office; Catherine Chertudi, Boise City; Brenda Tominaga and Lynn Tominaga, Idaho Ground Water Appropriators; Tim Corder, Mountain Home; Lance Bates, Twin Falls; Lewis Rounds, Idaho Department of Water Resources/Water District 120; Ken Harward, Association of Idaho Cities; John Wiskers, CH2M Hill; Della Johnson, Claudia Haynes; Director Karl Dreher, Dave Tuthill and Brian Patton, Idaho Department of Water Resources; Norm Semanko and Gayle Batt, Idaho Water Users Association; Larry Pennington, North Side Canal Company; Maggie Colwell,

Idaho Association of Counties; Ted Diehl, North Snake Canal Company; Bill Thompson, MID; Scott Rhead, United Water; Linda Lemmon, Thousand Springs Water Users; R. D. Schmidt, Bureau of Reclamation; Thorleif Rangen, Rangen, Inc.; Brent Olmstead, MPI; Bill Jones, TSWU; Trent Wright, Ada County Association of Realtors; Barry Burnell, DEQ; Jason Ronk, Building Contractors; Charles Coiner, Twin Falls Canal Company; Steven Daley Laursen, University of Idaho; Suzanne Schaefer, SBS Associates; Steven Balster, Busch Ag; Jim Carrie, NAHB, Josh Tewalt, Representative Otter's Office; Mike Freese, Senator Craig's Office; Neil Colwell, Avista Corp.; and Richard Slaughter, University of Washington.

After opening remarks from the cochairmen, **Mr. Jerry Rigby, Chairman of the Idaho Water Resource Board,** was introduced as the first speaker. **Mr. Rigby** explained that the Water Resource Board was created by Article XV, Section 7 of the Idaho Constitution. The Board has powers to:

- Construct & operate water projects & issue bonds
- Generate & wholesale hydroelectric power

  Mr. Rigby explained that the Board does own and operate a hydroproject at Dworshak and that this is very successful.

- Appropriate public waters as trustee for agency projects

  This means that the Board owns water for other agencies as well as themselves because the Board is the only agency that can own water. This is very unique.

- Control & administrate state lands for water projects
- All under laws prescribed by Legislature

  The Legislature passed this early on because of concern that boards could make decisions regarding water that the state might not necessarily want. There are safeguards built into the statute that always put the power back to the Legislature.

- Formulate and implement state water plan for optimum development of water resources in public interest
  - Legislature may amend or reject plan
  - Changes to plan by Board become effective unless amended or rejected within 60 days after submission to Legislature

Mr. Rigby next referred to Section 42-1734, Idaho Code, and explained that the Legislature, in promulgating the effect of the constitutional powers of the Board,

addressed these additional powers:

- Institute judicial proceedings to have water rights established on any stream, lake or underground water basin with costs borne by the state

  Mr. Rigby noted that this right, in and of itself, is one of the powers that is granted to the Board that can be a potential fix or one method to help solve the issues being dealt with.

- At Governor's request, represent state in actions and negotiations involving the federal government or other states
- To accept, receive, initiate, investigate, consider and promote such water projects it deems in the public interest
- Apply and obtain permits to appropriate, store, or use unappropriated waters of any body, stream, or other surface or underground source of water for specific water projects
- Acquire, purchase, lease, or exchange land, rights, water rights, easements and franchises deemed necessary, including eminent domain

  Mr. Rigby said that as he prepared this presentation, he was surprised by some of the powers granted to the Board that he had not reviewed for some time.

- Cooperate in water studies, etc. with state and federal agencies
- Present to Governor report of plans, costs and feasibility of water projects and to construct such projects authorized by the Legislature
- To enter into contracts and make loans for rehabilitation and repair of existing facilities

Mr. Rigby emphasized that these powers are distinct to the Board and are not given to the Department of Water Resources.

Another power granted to the Board is the Water Supply Bank. Water Supply Bank rules were first adopted by the Board in 1980. The purpose of the Water Bank is to:

- Encourage highest beneficial use of water

  Mr. Rigby explained that the Water Bank allows for the temporary transfer of water to be used by others, providing the rules are adhered to and procedures are applied.

- Provide a source of adequate water supplies to benefit new and supplemental

water uses
- Provide a source of funding for improved water user facilities and efficiencies

The Water Board has a 10% fee that is applied to the Water Bank that is paid to the Board to be used for loans and in the granting process.

The Water Supply Bank is used for the purchase, sale, lease or rental of natural flow or stored water provided it is in compliance with state and federal law but it is not intended to prevent directly selling or leasing outside the purview of the Water Bank rules. The purposes of the Water Bank are accomplished through rental pools administered by local committees appointed by the Board. Committees adopt rental pool procedures as approved by the Board.

Mr. Rigby noted that another major issue relevant to the Committee's work and that people are interested in is minimum stream flows and the powers the Board has in regard to minimum stream flows. In his opinion, this is one of the most widely misunderstood rights in water. The Legislature declared that the streams and their environments be protected against loss of supply to protect fish and wildlife, habitat, aquatic life, recreation, aesthetic beauty and water quality. The Legislature has provided that it is in the public interest and declared a beneficial use to have minimum stream flows. These minimum stream flows are ahead of any entity for out-of-state diversion. When this action occurred, there was a concern that there would be interbasinal transfer of water to states such as California. Minimum stream flows apply only to unappropriated waters and are created through application to the Director of the Idaho Department of Water Resources. They are just like any other water right.

Minimum stream flows will be approved by the Director if they do not interfere with vested water rights (earlier than date of application). **Mr. Rigby** explained that a minimum stream flow right is nothing more than a second or third or fourth or the last of several water rights and if nothing is left, nothing is received. There is no requirement that the minimum be there, the requirement is that if other upstream users and downstream rights are all being filled, then before any other use can be made of that water, it has to be left in the stream.

The Director will approve the minimum stream flow right if it is in the public interest and it is necessary to preserve the springs, wildlife, water quality and so on. It will be approved by the Director, not because it is always going to be there, but that it is a minimum, not the ideal or most desirable, flow or lake level. Flows are calculated using records and gaging. The flows are not guaranteed.

Mr. Rigby noted that the Water Board is the only agency that is authorized to own flow water rights. The main reason for the Board's independence from the

Department is because the Department cannot own a water right while at the same time be the entity that licenses and manages that same water.

Mr. Rigby explained that a law was passed in 1988 to provide for development of a comprehensive state water plan, with implementation to be administered by the Board. These plans may include protected rivers (natural or recreational). The Board is to inventory unappropriated waters, recommend appropriations, develop lists of proposals for storage and ensure citizens are not denied the right to divert and appropriate unappropriated water.

In the context of a comprehensive state water plan, rivers possessing outstanding fish and wildlife, recreational, aesthetic, historic, cultural, natural or geologic values are to be protected for the public benefit and enjoyment.

Prior rights are to be protected and no water rights are to be created by designation alone. A waterway may also be designated as an interim protected river prior to preparation of a plan.

Mr. Rigby noted that once the plans are adopted, they are submitted to FERC and the Power Planning Council and other federal agencies as THE state water plan for conservation, development, management and optimum use of the state's water resource.

State agencies are to exercise duties in a manner consistent with the plan and all future filings, permits and decrees are to be determined with respect to their effect on the plan.

Mr. Rigby also pointed out that impoundment of water in the reservoir in excess of 10,000 acre feet must be submitted for approval to the Board by statute.

Mr. Rigby's complete power point presentation is available at the Legislative Services Office.

Representative Jaquet asked for clarification of the staffing of the Water Resource Board. **Mr. Rigby** explained that at one time the Board was independent from the Department and was considered a separate agency. Since that was changed, the chief administrator of the Water Resource Board is hired by the Department of Water Resources. In essence, the chief administrator of the Water Resource Board is assigned to both the Department and to the Board. Planners for the Water Resource Board work for the Board but are employees of the Department. In his opinion, the system works well but it can be confusing.

Senator Cameron asked for an explanation of the parameters for which the Water

Resource Board could bond and asked whether bonding has been done for any projects in the past. **Mr. Rigby** answered that the Board is almost constantly in the middle of some bonding issue. Most recent actions involved United Water and Tamarack. In determining what projects are bonded and whether bonding can be done for lack of usage of water versus storage facilities, **Mr. Rigby** stated that his understanding of the policy of the Board is that as long as it relates to water, bonding can be done. Any project that is deemed by the Board to be in the best interest of the water resources of the State of Idaho can be bonded. **Mr. Rigby** clarified that he is not bond counsel. In his opinion, there are not many restrictions.

Senator Cameron asked if the Board would have the ability to bond for the management, use or implementation of water, rather than just for a project and could they have the ability to use bond funds to help lay land idle. **Mr. Rigby** said that his understanding from preliminary questions of bond counsel is that the Board could do this but that is not yet certain. **Senator Cameron** asked for more information on bonding at future meetings.

The Honorable Tom Nelson, United States Court of Appeals for the Ninth Circuit, and former counsel for the Idaho Power Company during the original Swam Falls negotiations, spoke to the committee regarding the Swan Falls Agreement. **Judge Nelson** stated that he was attending today's meeting in a private capacity, not representing any of his former clients including, but not limited to, Idaho Power Company, and was not speaking for the Court of Appeals or any of its members.

Judge Nelson explained that as part of the background for the Agreement, it is important to keep in mind that the state kept insisting that Idaho Power was not going to manage the Snake River. This point was repeatedly made. Idaho Power's consistent response was that it did not want to manage the river, but that the state needed some additional tools if it was going to get actively involved in managing the river. The parties ultimately agreed to ask the Legislature to provide these tools, including adjudicating the river, additional funding for data gathering, and public use criteria. The Agreement itself did not attempt to manage the Snake River.

Judge Nelson noted that at least two of the prior speakers have said that the parties did not discuss the possible impacts of a drought on the flows in the river. That is true but not surprising for at least two reasons. The first being that response to a drought is usually one of management. The agricultural community decides what crops to plant, what pastures to irrigate and whether any supplemental supplies are available, among other considerations. The state, in managing the river, has to decide if any junior water rights need to be curtailed, among other things. This sort of management consideration was not on the table during the discussions, it was left to the state. Another reason drought was not

discussed was that the parties had the opinions of several hydrologists in arriving at the amount of water available for future depletion, above the minimum flows. Any look at the available water in the Snake River Basin has to consider historic flows, which includes past drought periods. In his opinion, it would have been surprising if the parties had discussed drought.

Judge Nelson noted that several of the prior speakers have been critical of the Legislature's failure to legislatively subordinate the power company's water rights at Swan Falls. Those criticisms fail to take into account the history of Article XV, Section 3 of the Idaho Constitution. As originally adopted, it provided that "the right to divert and appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied." The provision was amended in 1928, to add the language "that the state may regulate and limit the use thereof for power purposes."

Judge Nelson noted that all of Idaho Power Company's rights at Swan Falls were in place before 1928. In light of that fact, he asked whether the state could apply the 1928 provision to the power company's pre-existing rights at Swan Falls.

Another example would be to assume that the Constitution was amended last year to provide that the state could regulate and limit the use of water for "power and agricultural purposes." Judge Nelson asked, in that instance, could the state now cut back and limit irrigation uses going back 75 or 100 years. In **Judge Nelson's** opinion, to ask the question in that way, you have answered it.

Judge Nelson indicated that one other matter may be worthy of short mention. Apparently there is some thought that the Swan Falls Agreement subordinated the rights of spring flow users below Milner particularly in the Thousand Springs Reach. **Judge Nelson** stated that there are a number of problems with this.

1. The terms of the Agreement itself. Section 7 defines Idaho Power's rights – no one else's.
2. The subordination provision refers only to Idaho Power Company's rights.
3. Section 19 provides that the Agreement is the entire Agreement between the parties, with no other promises, covenants or understandings existing outside the Agreement.

In addition, the parties to the Agreement were the state and Idaho Power Company. The power company had no authority to act for anyone else. The state had no authority to unilaterally subordinate existing uses of non-parties, and would have encountered substantial constitutional problems had it attempted to do so.

Judge Nelson made some closing remarks and the Committee thanked him for his presentation.

Representative Stevenson moved that the minutes from the July 7, 2004, meeting be approved. **Senator Cameron** seconded and the minutes were unanimously approved by the Committee.

Mr. Wayne Hammon, Idaho State Executive Director for the U.S.D.A. Farm Service Agency (FSA) was introduced to discuss federal farm programs. **Mr. Hammon** explained that he supervises the administration of all federal farm programs in Idaho. Chief amongst those is the Conservation Reserve Program. At the end of last year's legislative session, the Farm Service Agency was approached by legislators to find out what role the USDA might play in helping address some of the needs and concerns facing this Committee. **Mr. Hammon** said that the federal government is not in a position to solve all of the problems but meetings with stakeholders have identified areas where the Department of Agriculture may be able to help.

The largest program, the Conservation Reserve Enhancement Program (CREP), is the most relevant. A fact sheet on this program is available at the www.fsa.usda.gov.

Mr. Hammon said that last month a tour of the CREP impact area was taken with committee members, FSA staff members, Senator Crapo, Congressman Simpson and county commissioners to see what might be done. Through that effort an interest from the national FSA office was secured in pursuing the program further.

Mr. Hammon noted that CREP is basically a voluntary land retirement program. In many Idaho districts there are CRP programs that involve almost 800,000 acres of farm ground that have been taken out of production for conservation purposes. Every acre of CRP to date has been dry land agriculture. In exchange for taking their land out of production, farmers receive a rental payment to provide for wildlife habitat and other conservation practices. The CREP program offers the same plan for irrigated land but with a much higher rental payment. The goals would be the same for wildlife habitat but include water conservation, air quality and water quality.

Mr. Hammon explained that the CREP would be limited to no more than 100,000 acres in the Snake Plain area. More specific locations will be developed at a later date as will the specifics of what the farmers will be required to do in return for the rental payment. Basically, the program wants the farmers to shut off their water. How and where that will be done will be worked out by a working group that consists of federal partners, state partners, cattlemen, grain producers, the Idaho

Farm Bureau as well as environmental groups and interested parties. It is the goal of the working group to develop a recommended package to bring back to the Committee and to JFAC before the legislative session begins.

Mr. Hammon went on to say that since this program will be a partnership between the federal and state government, the federal government will cover 80% of the cost of the package with the state coming up with the remaining 20%. This 20% can be provided through technical services from the Department of Agriculture or Water Resources as well as with actual cash.

Mr. Hammon commented that the target for the rental payment is $118 per acre per year. Some producers have stated that they would not take their land out of production for that amount of money and **Mr. Hammon** said that the state could add to that as part of its 20% provision. Also, it could be decided that certain areas of the state would receive higher payments than others. He emphasized that since the national FSA staff was able to visit Idaho and look at the ground, and after they saw the map and talked with affected parties, it is his belief that $118 per acre is where the federal limit will be set.

The working group or Natural Resources Committee will have to address the issue of how to prove that environmental benefits will result by the land being taken out of agricultural production. One thing it will need to show for the CREP program is water savings. **Mr. Hammon** stated that his branch of the federal government has no interest in the water on this land or in getting the water downstream, they are interested in the land itself. He said that this will affect the moratorium because if there is more water in the aquifer, does that mean more wells can be drilled. What happens to the moratorium will have to be worked out during the next legislative session. As long as it can be shown that water is being conserved and the moratorium is still enforceable, the federal agency is on board.

Mr. Hammon said that during the tour, some of the farmers who were present provided valuable insight as to the effectiveness of the moratorium or, more importantly, the ineffectiveness of it. This raised a flag with the people from Washington, D.C. and they will be looking at this.

In response to a question from **Representative Raybould, Mr. Hammon** said that if a canal company agreed to reduce its water right by 10% and leave that water in the river, conservation could be shown, but it is tricky. As long as it can be shown on paper that the water is left in the river, that individual contract has been fulfilled.

Representative Raybould asked if a water right holder could show that the amount of water that was left in the river was applied to the 427,000 acre feet that the state is required to provide for flow augmentation, whether that would qualify as

conservation. **Mr. Hammon** said that it would and that was the specific scenario that he has asked the national office to look at.

In response to another question from **Representative Raybould, Mr. Hammon** stated that there is a payment limitation to individuals for this program but it is separate from any payments they receive from other programs.

Mr. Hammon explained that the contracts for this CREP program will be for 15 years. A participant can withdraw from the program before that time but would be required to pay back all of the money they have received under the program.

Senator Stegner commented that there is little question that the large CRP program of the early 1990s contributed to the decline of many rural economies in some way or another. He said that taking a lot of production out of a single area impacts many additional small businesses, especially agricultural support businesses. He asked whether this is being taken into consideration for the CREP program and if so, is there consideration for direct support for ancillary businesses. **Mr. Hammon** agreed that the 1990 CRP enrollments did affect many local economies. In Bannock County almost 40% of the available crop ground is enrolled in the CRP. Due to the impact this had on local economies, a new farm bill was signed by the President in 2002 that establishes a 25% cap in counties relating to enrollment in this plan. This means that no county can have more than 25% of its farm ground enrolled in this program at any time. Counties such as Bannock, Onieda and Power, that are above the cap are barred from enrolling any new ground. Once those contracts expire, that ground will not be renewed until enrollment is below 25%. He added that FSA has no program to assist the ancillary industries affected when land is taken out of production. **Mr. Hammon** said that in areas that this new CREP will target, he does not think enrollment in other CRPs is close to 25%.

In response to a question from **Representative Bedke, Mr. Hammon** said that the tour focused on the issue of ground water being available to senior water right holders. He stated that it will require a lot of special attention to make it work. He added that air quality and wildlife benefits will be gained and that in the Thousand Springs area the most senior water right holders are aquaculture facilities and much of their water eventually passes on to the river.

Senator Stennett asked if someone agreed to accept less than $118 an acre for this program, could the 100,000 maximum acres be increased. **Mr. Hammon** said that he is not sure at this time. He added that the 20% match above the 80% the federal government will contribute can come from any source, it does not necessarily have to come from the state.

In response to a question from **Representative Jaquet, Mr. Hammon** explained that

what concerned his office in Washington, D.C. the most was the enforcement aspect of the moratorium. Concerns stem from people getting a waiver from the moratorium for a domestic well and later converting it to agricultural use or instead of allowing individual wells for ten or so homes, the waivers were granted to allow municipalities to build a much bigger well. He said the concern is putting more water in the aquifer only to have more water taken out.

Mr. Hammon explained that for areas such as the Mountain Home Aquifer that does not show the same responsiveness as the Snake River, the nature of the environmental benefit is being explored. He noted that a second CREP program could be designed specifically for that area.

Representative Nielsen asked whether the 100,000 acre limit could be enlarged as more areas of the state are included in the program. **Mr. Hammon** stated that 100,000 is the statutory limit but multiple projects can exist. California has three separate CREP programs that address different issues.

Mr. Hammon said that the goal is to have an outline of the program to this Committee by late October or November. This outline will include the price tag of the program. They would like to have this completed before the legislative session to allow time for legislative action and hope to actually be picking land for the program by this time next year. He added that the federal money has already been approved. It will be funded from the Commodity Credit Corporation and money will not be taken from another program to fund it.

In response to a question from **Representative Nielsen** regarding the receipt of payments for CREP and for a program from the Bureau of Reclamation**, Mr. Hammon** said that it is his understanding that farmers can receive payments from both programs provided environmental needs are being met.

Senator Williams asked whether there was interest from power companies regarding the 20% payment due to the benefits they could receive from such a plan. **Mr. Hammon** said they have made preliminary inquiries to utility companies. At this time, the utilities are not interested in paying for the whole thing but they have been invited to join the working groups.

Mr. Ken Harward, Association of Idaho Cities, was the next speaker. He explained that in a statewide meeting, areas of concern for municipalities were discussed. These areas included:

- overall protection of municipal water rights
- aquifer recharge
- wastewater reuse

- transfer of water rights to cities upon annexation and development of agricultural ground
- impact of wells in unincorporated areas on municipalities

He explained that to that end the group has looked at state statutes as well as developing a model ordinance that cities could adapt to meet local conditions. Many cities are doing this.

Mr. Harward said that another meeting of this group will be held on September 14 and invited committee members to attend. He explained that Senator Noh and Representative Raybould, as well as Clive Strong and representatives from the Idaho Department of Water Resources will be attending. The intent of the meeting is to develop a plan to bring back to this Committee for review.

In response to earlier discussion of the moratorium, **Director Dreher** explained that regardless of the fact that the moratorium was established by the order of his predecessor, that order is enforceable by both the Department and by the courts. From his perspective, the Department is enforcing the moratorium and if violations are known to exist, they need to be reported to the Department.

He also noted that, in his opinion, mechanisms are in place to protect any water made available without changes being made to Idaho law. **Director Dreher** said that lands that would be retired above the Thousand Springs would allow the bulk of increased reach gains to occur to the springs. Most of the use of that water would be nonconsumptive. He explained that the most senior water rights are irrigation rights, not fish propagation rights, located at the end of Billingsley Creek. There is a streamflow that could be used and would be used to move that water through the reach to those senior irrigation rights.

Director Karl Dreher, Idaho Department of Water Resources, continued with a discussion of the challenges involved with the administration of water rights under current laws in Idaho. He noted that this does not mean our current system does not work, it just does not work all of the time in all places.

Director Dreher explained that the prime mechanism for administration of water rights are the water districts. Participation in water districts is not voluntary but mandatory once water rights are adjudicated. Where ground water rights have not been adjudicated, such as in the Bear River Basin, there is no mechanism by which the Director can create a water district for administration. One of the results from the Snake River Basin adjudication that is nearing completion is that many new water districts are being created. These include Water District 120 in the American Falls area that consists entirely of ground water rights and Water District 130 above the Thousand Springs area that consists mostly of ground water rights.

The statutes that authorize the creation of these water districts allow the Director to create the districts by order. Creation is mandatory and the process for disputing or objecting to the action comes after its creation.

Director Dreher noted that the actual distribution of water in accordance with Idaho's prior appropriation laws is accomplished by water masters. These are people in the field that, with deputies, distribute water under the supervision of the Director of the Idaho Department of Water Resources. Even though the Director supervises the water masters, he is not the one who puts them in place. They are elected by the right holders in each water district and then appointed by the Director based on the election results. There are no minimum qualifications required to be a water master.

Director Dreher went on to say that the water masters are elected by water right holders in the water districts and the water users set their budgets independently of the Department. The water masters are paid by the water right holders based on the districts' budgets. Sometimes budgets are totally inadequate but the Director has no control over that. Water districts may also elect advisory committees, such as the Committee of 9 for Water District 1, that are charged to serve as advisors to the Director and to the water master.

Director Dreher noted that in many instances the budgets set by the water users are only sufficient to provide for part time water masters who hold other jobs even during irrigation season when the water needs to be distributed. In many instances the budgets are not adequate to provide for the purchasing of water measurement equipment causing the Department to have to send people out to make the water measurements for the districts or to loan equipment to the districts. Another significant impact of inadequate budgets is that not having sufficient funds compromises the records of the water diverter and reporting to the department. This further impairs the Department's ability to manage. In one example the Director went back to a book that the water master had filed and the official record for historic water diversion under this particular water right showed the same quantity of water every day of the week and every month of the irrigation season. In his opinion, there is no way that is how the water was used. The water master probably did this due to an inadequate budget and due to the fact that it was a part-time position. These water masters get paid based on water diversions, so something had to be filled out.

Director Dreher continued that many water districts also lack measuring devices that are permanently installed at diversions and lack controlling units. In some cases this leaves the water master to simply guess or make up the amounts of water that are diverted and entered as the official record. The Department also suffers from a lack of communication with inadequately funded water districts.

Many don't have telephone answering equipment, cell phones or faxes, not to mention computers and internet access. In extreme cases, water masters might not even have telephones.

Director Dreher emphasized that there are many water districts in Idaho that function as they are supposed to and said that Water District #1 is probably one of the best. He added that the water master in the Boise area does a very good job. Unfortunately they tend to be exceptions.

Another problem that results from inadequate budgets and the part time nature of the work is a lack of qualified water masters. In some cases the water masters are beyond retirement age and are not physically capable of doing the work.

Adversarial water masters are also something the Department is forced to deal with. Since these water masters are elected by the right holders, usually neighbors and family members, they often take the side of those people rather than the Department under whom they are working. At times these water masters will become advocates for the right holder upon which an administrative action is required. Having a water master that refuses to follow the instructions of the Department is, in **Director Dreher's** opinion, not acceptable. It makes the Department's job very difficult. **Director Dreher** provided a number of examples.

Director Dreher emphasized that the water distribution by the water master is supposed to be under the supervision of the Director of the Idaho Department of Water Resources.

Director Dreher explained that other types of water districts exist, one example being ground water districts. Ground water districts are signators to the one year interim agreement. There are five ground water districts in Idaho including:

- North Snake Ground Water District
- Magic Valley Ground Water District
- Aberdeen/American Falls Ground Water District
- Bingham Ground Water District
- Bonneville Ground Water District

According to **Director Dreher**, these ground water district's unique role is to operate to provide mitigation for out of priority diversions by holders of ground water rights. **Director Dreher** noted that membership in a ground water district is voluntary and they are created by a petition process of 50 or a majority, whichever is less, of the ground water right holders in an area to the county commissioners. The county commissioners send notice and hold a hearing to which ground water right holders can send written notice requesting inclusion or exclusion from the ground water

district. County commissions then organize ground water districts into divisions of not less than three and no more than seven for the election of directors to govern their activities. Unfortunately, like water districts, ground water districts set their budgets independently of the Department's supervision.

Director Dreher went on to say that the biggest challenge to the Department in working with ground water districts is that membership is voluntary and excludes domestic wells. This is a problem, according to **Director Dreher,** because it injures the implementation of meaningful mitigation due to the fact that ground water right holders who would otherwise benefit from mitigation, use the exclusion process to avoid equitable participation from mitigation.

According to **Director Dreher**, another problem is collection of assessments. This is due to the fact that the districts are not in the business of collecting bills. The statute provides that these assessments can be collected by the counties with property taxes but that is at the discretion of the county. Initially the counties were cooperative but recently this has changed and one county has informed the Department it will no longer collect the assessments.

Director Dreher noted that collection of delinquent assessments is not timely and can require that the ground water district file liens against the right holders property.

Ground water districts can employ a hydrographer to make the measurements and reporting that would otherwise be done by the Idaho Department of Water Resources. These hydrographers are not employed or supervised by the Department so there is limited control over the quality and timeliness of the measurement and reporting.

Director Dreher explained that the third type of district that exists in Idaho is the Aquifer Water Recharge District. Participation in this type of district is a mixture of mandatory and voluntary with a petition being submitted to the Director. Such a petition requires signatures of 50% of the ground water right holders that divert at least 1 cubic foot per second within the boundaries of the proposed district. Following the petition, the director provides notice and holds a hearing either approving or denying the formation of an aquifer recharge district. The board of directors for a recharge district is composed of five members each representing a particular segment of water use. These districts also set their budgets independently from any oversight by the Department.

Director Dreher went on to say that challenges revolve around the fact that these aquifer recharge districts do not include domestic wells, electrical generating companies and municipalities unless a municipality has requested membership. Any

other entity can also be excluded if they allege and sufficiently argue that they do not receive any benefit from the recharge district. **Director Dreher** said that this creates a situation where entities that do receive benefit from recharge can avoid equitable participation in those projects.

Another problem with the recharge districts, according to **Director Dreher,** is the requirement for petition by 50% of the ground water right holders deferring at least 1 cubic foot per second. In his opinion, most people would not vote to increase a tax or assessment that they have to pay. Due to this, there is really only one recharge district operating in the state and that recharge district is much smaller than it was originally intended to be. The reason for this is because the proposed boundaries had to continue to be shrunk until they had an area in which 50% of the right holders would agree to the district. That district is the Lower Snake Aquifer Recharge District the operates north of Shoshone.

Representative Stevenson said that in a discussion he had with the national Farm Services Association people, it was their concern that the Director of the Idaho Department of Water Resources could put a moratorium on or lift it and they felt that legislative oversight would make them more comfortable.

Representative Bedke asked whether the challenges regarding data collection and measurement are the data points that will be put into the model and if so, what assurance is there that these data points are accurate. **Director Dreher** said that his comments regarding the challenges above are regarding statewide administration. He continued that the Eastern Snake Plains Ground Water Model calibration data used for the model consisted of two types of information, reach gains and reach losses, based upon gaging stations on the Snake River. The data also included ground water level measurements. In terms of the measured reach gains, those were made either by Water District #1, USGS or Idaho Power. **Director Dreher** emphasized that in no case did they rely on measured surface water flows that were made by a problem water district. Ground water level measurements were made under contract to the Department by the USGS and there was no reliance on any water master data. In his opinion, the data that was used to calibrate that model received substantial quality control efforts that normally would not apply in a water district.

Senator Noh stated that the opportunity for interim administration has proved useful in a number of cases in serving water administration before adjudication is finalized. In his opinion, often one of the reasons some of the awful water dilemmas arise is because there is no active administration until adjudication is complete and that usually takes quite a long time. He asked if there is some way for the state to begin, where there is no general adjudication, to get on top of our water management problems. **Director Dreher** agreed that adjudication must be

completed except for one process that the Legislature put into the adjudication statute. This process allows, once a Director's report is filed in an adjudication, for a party to petition the adjudication court to authorize the Idaho Department of Water Resources to begin interim administration. He added that the Department has used this successfully in the Snake River Basin Adjudication.

Director Dreher continued that under current law, absent adjudication, there are limited instances regarding ground water rights in which a water district has been created based upon adjudicated surface water rights. If there is a reasonably small population of ground water rights that are so integrated with the surface water rights, they can be put into a water district without an adjudication. This is the exception. For administering the larger population of ground water rights such as in the Rathdrum/Spokane area, formation a ground water management area or a critical ground water management area is the only tool available to the Director. In **Director Dreher's** opinion, the Legislature does have the power to pass legislation that would alter the requirement that adjudication occur prior to the creation of a water district. In response to a question from **Representative Jones, Director Dreher** said that no specific legislation has been prepared by the Idaho Department of Water Resources to solve these problems but he would be happy to discuss that with legislators. He would suggest having the Legislature look at the problems he has discussed today and discuss the issues before hearing any proposals.

Senator Noh asked whether the state is equipped legally and legislatively to actually shut down head gates or pumps for curtailment. **Director Dreher** said that, in his opinion, that could be done but it would be difficult due to the structure of water rights administration.

Representative Bedke said that in many ground water cases that take precedent in the area, it would seem that if a senior water user is going to shut a junior water user off, the term "reasonable ground water level" needs to be defined. In his opinion, since that term is undefined it would seem to one of the major challenges in administration of ground water rights. He asked if the term "reasonable ground water level" is the Legislature's prerogative, the Director's prerogative or each individual district. **Director Dreher** explained that there is some inconsistency in the statute regarding the establishment of a reasonable pumping level and the statutes that prohibit ground water withdrawal beyond the natural rim of the channel. He stated that since these levels change, neither he nor his predecessor felt comfortable making a determination as to what reasonable ground water levels should be. What may be equitable and reasonable in one year may not be so in future years. **Director Dreher** went on to note that the Legislature could define "reasonable pumping levels" or it could require the Director of Idaho Department of Water Resources to do so.

Director Dreher reminded the committee that the difficulty lies with the fact that the state is not supposed to be in situations as those that exist today. There have been many discussions about why the state is in this situation and a number of critics continue to say that it is because the Director and his predecessor over-appropriated the aquifer. **Director Dreher** explained that the state did allow appropriations of both ground water and surface water when the supply was artificially high and could not be sustained. The water that was appropriated, in large part, would not have been there without the actions of the Department in the preceding decade. In his opinion, the state has some responsibility for this but that does not mean the state has over-appropriated ground water. The law promotes full economic development but, according to **Director Dreher,** there was an over-allocation of the amount of water that reasonably could have been expected to be there. Not to second guess his predecessor, **Director Dreher** said that with the data collections and models that exist today, the Department is better informed about the situation and how we got here than in the past when they were looking at the water supply and having to process applications to appropriate it. The water was there at the time. There was unappropriated water and the Idaho Constitution makes it clear that the right to appropriate unappropriated water shall never be denied.

In response to a question from **Representative Jaquet, Director Dreher** explained that Water Board members are appointed to four year terms and that the statute does not include any term limit. He added that the Governor has stated, in general, that serving two terms on any type of citizen board is sufficient in most cases. In **Director Dreher's** opinion, Water Board issues are very complex and it is difficult to find people that are qualified or informed enough to serve. **Director Dreher** noted that the system is working and that it is the Director's responsibility to provide staff for the Water Board. He has assigned Mr. Hal Anderson to do that. Other states do this differently. Utah, for example has a Division of Water Resources within the Department of Natural Resources that does the planning and financing programs similar to what the Water Board does in Idaho. **Director Dreher** said that he views his role with the Water Board as being responsible for providing staff support and as an advisor. He also thinks that close working relationship between the Department and the Board allows the two to shape each other's actions so that they are consistent and compatible.

Dr. Christian Petrich spoke to the committee regarding the Treasure Valley Aquifer. **Dr. Petrich** explained that the Treasure Valley area stretches from the foothills down to the Snake River with ground water flow moving toward the Snake River. The Treasure Valley system consists of the same types of water use features seen in other parts of the state with rivers, canals and reservoirs. There is seepage from the canals, recharge from the aquifer system and some movement from shallow to deep and from deep to shallow. There are isolated pumping withdrawals from areas

throughout the basin and the entire basin is also underlaid by a geothermal system that heats a number of downtown buildings.

Dr. Petrich noted that looking from the southwest to the northeast covering the entire basin it shows that 1.9 million acre feet is coming into the basin from upper portions of the Boise River basin with much more precipitation in the mountains. There is also an estimated 270,000 acre feet in precipitation and water brought over from the Payette River through the Black Canyon system into the Lower Boise Valley. Approximately 1,380 kAF are diverted out of the Boise River, 600 kAF are lost to evapotranspiration and there is discharge that goes back to the Snake River. That amounts to, on an average year, approximately 1 million acre feet leaving based on the gage at Parma.

Dr. Petrich explained that the flows at Parma are highly variable but highly stable and have not decreased. He explained that on a average July day there is approximately 4,500 cfs coming out of the Boise River and much of that is diverted into the New York, Ridenbaugh and a number of other canals toward the upper portion of the system amounting to approximately 3,400 cfs. About 1,200 cfs ends up back in the river and there is water (1,600 cfs) rediverted, resulting in approximately 700 cfs actually leaving the valley on a typical July day.

Dr. Petrich noted that there are a variety of different water issues in the Treasure Valley including:

- Water supply issues associated with population growth and urbanization
- Flood plain development
- Water quality

Over the last 30 years the population has increased substantially with close to 450,000 people in valley and that growth is continuing. Projections suggest close to 1.2 million by 2050. In terms of water supply, **Dr. Petrich** explained that there is an abundant amount of water in most of the valley. At this point some of the water in the eastern and central areas is not always available where and when it is needed. Approximately 1 million acre feet leave the basin each year but this water is not necessarily available due to a number of ESA constraints that limit its use.

For the most part, according the **Dr. Petrich,** the water levels in the area are stable except in southeast Boise and in an area south of Lake Lowell but these also have stabilized. Some of the declines may simply represent equilibrium in response to increased pumping that has occurred over the last several decades. As the population has grown, the pumping has increased and so some decline is expected.

Dr. Petrich stated that the shallow aquifer system is most easily influenced by land

use changes and by local irrigation and withdrawals. There are seasonal water level fluctuations. In some areas the water levels are controlled by surface topography or drains so decreases in recharge from irrigation or increases in shallow withdrawals may not lead to water level changes, they may lead to changes in drain flows.

In 1937, water levels rose in response to the construction of canals such as the New York Canal and the development of irrigated lands. Between 1937 and 1994 much land was taken out of irrigation and developed. Urbanization leads to different types of water use, different seasons of water use and different sources of water use. Demands for DCMI are expected to increase from 105,000 acre feet to 190,000 acre feet by 2030.

Dr. Petrich noted that most municipal water currently comes from ground water sources but an increasing amount is coming from surface water sources. One way of reducing the amount of water required from ground water is to use pressurized surface water irrigation that reduces the amount of deep-aquifer water used for urban irrigation. Another way to reduce the amount of ground water being used is to increase the use of dual pressurized irrigation systems.

According to **Dr. Petrich,** urban irrigation involves a different system of use with irrigation beginning earlier and continuing later and that surface water irrigation in urban areas may encourage more irrigation because it is fairly inexpensive. There may also be an incentive to use municipal water if surface water ends in a dry year unless a system has a backup well. Nonetheless, municipalities that are supplying growing urban populations are still going to need to supply capacity for domestic needs, fire flows and irrigation.

Dr. Petrich said that in the valley, the question of how urbanization has changed the quantity of water used has not been well documented. To do this, there is the need to quantify water use changes associated with urbanization and to compare before and after changes in water use for potable water, irrigation and conveyance changes. Stakeholder participation would be required to quantify this.

Dr. Petrich said there has been talk of introducing legislation that might help maintain irrigation water for urban development with the goal being to protect the deep aquifer by maintaining surface water supplies. In other words, making it more difficult for people to sell their water rights and then come to municipalities to supply water for the urbanizing area. Legislation like this would need to allow flexibility for using water savings to provide water for irrigation, municipal, commercial and industrial uses, future land use change and to allow current irrigation entities to supply water for pressurized irrigation or other uses.

There are currently 390 active pending applications for water in the valley and most of them are for irrigation but many are for irrigation of a very small amount. According to **Dr. Petrich,** this does not reflect the entire need for additional water in the valley. Computer simulations conducted suggest that many areas could support additional withdrawals without decline. **Dr. Petrich** added that ESA issues in the lower Snake River would partly constrain large scale expansions in ground water extraction.

Dr. Petrich explained that even if the Idaho Department of Water Resources was going to process applications for water in the valley, it would require substantially greater resources than currently exist. Today, the Department processes between 20 to 40 applications statewide, excluding transfers. This leaves a backlog of 1,000 name changes and approximately 2,000 permits that may be eligible for licenses that are waiting on a field exam. More resources are also needed for enforcement.

Dr. Petrich noted that shallow surface and ground water are connected in the Treasure Valley and that the Boise River is a gaining reach for most of the stretch from the eastern part of Boise through the valley. He explained that there is an extensive drain system that leads water toward the river.

The Idaho Department of Water Resources is evaluating conjunctive administration options in the areas tributary to the Boise River above Star Bridge. The reason for this is flows in this area can get very low and surface water above that is almost fully allocated. Other opportunities for conjunctive management include options for more expanded use of shallow aquifers and other ways of recharging shallow aquifers and using aquifer storage and recovery to enhance availability within the shallow aquifer system.

Floodplain development is another growing issue. **Dr. Petrich** said that floodplain development has increase the vulnerability for flooding along the Boise River. A 100 year flood would have a strong impact on the valley but a 500 year flood would be very serious. Flooding in the Glenwood Bridge area in a 100 year flood with debris that would reduce flows 20% would put 16,600 cfs of water out of the river and into the streets and residential areas.

In conclusion, **Dr. Petrich** noted that there is sufficient water available of sufficient quality in the Treasure Valley for the current population but it is not always available where and when it is needed. ESA constraints do limit the use of the discharge from the basin. The average flow in the Boise River has not decreased due to urbanization and the water problems in this area are probably not as acute as the Eastern Snake Plain. The water supply problems in the Treasure Valley are not necessarily associated with lack of supply or water level declines, but are more

associated with transitions to new uses. **Dr. Petrich** said that the changing demand will require that the water use changes be better identified and development of different approaches to supplying water where and when it is needed. Another requirement will be to not only supply further irrigation water with surface water to whatever extent possible, but also be able to provide enough additional water for municipal and commercial uses to meet the needs of a growing population as well as an increased attention to water quality. It will also be important for the Treasure Valley to manage the flood risk.

The challenge to the Treasure Valley, according to **Dr. Petrich,** is to manage the water in the transition from agricultural to a more urban environment within the context of ESA constraints.

Representative Raybould asked if, with the high degree of recharge and withdrawal from the aquifer, the substrata under the aquifer is fractured or porous enough that it could store enough water to carry the population over in a drought situation. **Dr. Petrich** said that the aquifer is very thick with fine sediments further down that make it more difficult to transmit water through them. This aquifer is about 1,000 feet thick. The shallow aquifer responds much more rapidly to changes in recharge and extraction while the deep system has potential for increased storage and increased carrying capacity through drought conditions.

Dr. Petrich added that sustainable yield is another part of the equation and is difficult to answer. Currently, the deep system has some very old water but it is difficult to figure out how much water can be extracted for recharge.

Mr. Clive Strong was introduced to give an update on the SRBA basin wide issue. He explained that this issue involves the Swan Falls Agreement and how that can be incorporated into the SRBA decrees. This has been an ongoing point of discussion, but he emphasized that reinterpretation of the Swan Falls Agreement is not happening. It is just a question of how to reflect that Agreement into the decrees so that, going forward, it will be reflected in the administration of the water rights. This is the first basin wide issue that has come from the court in some time and the report will be filed in 2005. This means the basin wide issue will be dealt with some time in 2006.

In response to a question from **Representative Raybould, Mr. Strong** stated that this is not expected to affect any existing partial decrees. Instead it will center on how the Idaho Power Company water rights will be reported in the use of the general provisions and all of the partial decrees are subject to those general provisions. The primary issue at play is whether that will simply be reflected in a water right or on the general provisions that occur in the decree.

The report for the North Idaho Working Group was given by **Senator Schroeder.** He said that the Mayor of Post Falls spoke at their meeting and asked that blanket legislation not be passed due to unintended consequences. There are also concerns with the State of Washington and the use or nonuse of water rights. There is money needed to protect and monitor the river due to the construction of the Rock Creek Mine. There is concern with the Coeur d'Alene Lake Management Plan. The Coeur d'Alene Tribe has provided $5 million for that effort and the state or federal government need to provide additional funds so that can go forward. The Rathdrum Prairie Ground Water Management Area Advisory Committee reported a water availability issue and are participating in a five state hydrologic study. This group suggested adjudication of all existing water rights on the Rathdrum Prairie and the formation of a water district. Discussion involved who would pay for that. The next meeting is scheduled for October 1, 2004 in Moscow, Idaho.

Senator Stegner commented that North Idaho faces different issues than the Eastern Snake Plain Aquifer area that is the main concern of this Committee. He said that both major aquifers, the Spokane Valley/Rathdrum Prairie Aquifer and the Moscow/Pulman Aquifer originate in Idaho and flow out-of-state. This brings about the issue of interstate relationships. He re-emphasized the need for good data and information regarding how much water is available and how much is being taken out of the system. The North Idaho Working Group is now considering asking the state to continue the adjudication process in Northern Idaho after the SRBA is completed. Completing adjudication of the entire state, in the opinion of the working group, would help provide base data that Northern Idaho desperately needs in order to deal with its water issues. **Senator Stegner** said that, in his opinion, it is not simply a matter of having some segments of Northern Idaho making that recommendation, it is approaching the level of a significant recommendation from the North Idaho Working Group to this Committee.

Senator Noh, as the new chairman of the Council of State Government River Governance Group, noted that at a meeting that was held in August, a discussion was held regarding the Rock Creek Mine and removal of a dam on the Clark Fork River and its impact on Lake Pend Oreille and the Rathdrum Prairie Aquifer. **Senator Noh** said that the meeting included a presentation from Mr. Clive Strong and Mr. Michael Bogert primarily on the Nez Perce settlement and how that fits into the overall Columbia River and Snake River management.

According to **Senator Noh**, another interesting presentation came from Washington State regarding the Columbia River Initiative. The initiative involves a proposal that would be accomplished largely by rule with a goal of generating 1 million acre feet of water that would be available to firm up the undeveloped and qualified irrigation permits in the Columbia Basin. **Senator Noh** noted that, by far, the majority of that water would come from conservation practices implemented voluntarily through

heavy financial incentives from Washington State. That water would be slipped between irrigation and other water rights and flows for salmon and fishery purposes. Additional storage facilities also appear to be part of this. There is strong opposition to this proposal from corporate interests. It was not clear whether the 427,000 acre feet of water that Idaho is required to provide for ESA purposes will be part of that or not.

Representative Cuddy commented on another issue that came up at the River Governance meeting that is important to his area of the state, that being the issue of dredging. In his opinion, It is important that the state continue to try to get dredging done in the Columbia River system in order to continue the barging of grain from Northern Idaho. It is much cheaper to ship by barge than any other alternative. **Representative Raybould** added that pollution in the Columbia River Valley would be much greater if the grain were sent by truck rather than by barge.

Senator Stegner offered another perspective about the need to support dredging in the Columbia River. He said that Seattle, being a deep water port can take in any size ocean going vessel that currently exists. Portland, Oregon, on the other hand, is inland about 60 miles on the Columbia River and there is restriction, depending on how deep that river channel is, to ocean going vessels. There has been a decline in the number of boats, particularly container ships that take containers overseas and involves both importing and exporting. This has been especially noticeable in the last few months. The entire region is down to one container ship line calling on Portland, Oregon. This has much larger implications than just how it effects grain shippers in Northern Idaho. It has implications for the entire Pacific Northwest and, in **Senator Stegner's** opinion, all of Idaho's import and export commerce. If Idaho is forced to have import and export capability only out of Seattle that is further away, competition is reduced and economic implications would be very great. **Representative Raybould** suggested preparing a Joint Resolution for the next legislative session in support of dredging in the Columbia River to allow ocean going vessels access to Portland, Oregon for importing and exporting purposes. **Senator Stegner** agreed.

Senator Cameron said that he would like to receive an update regarding what Idaho's water capacity and water supply is currently. He also suggested having bond counsel speak to the committee to inform them what can be done through bonding. A discussion of what is permissible and what is not would be helpful as would a discussion of funding alternatives.

Senator Cameron added that farmers in his area need to know what is going to be expected of them soon and whether or not curtailment is going to be required.

Representative Raybould noted that regarding the water supply, due to the timely

beneficial rains, reservoir usage has not been nearly as high as expected. In a discussion with the water master from Water District #1, **Representative Raybould** was informed that they feel that the water carry-over this year would exceed that of last year to some extent. **Senator Cameron** said that he would still like to receive a formal report by the Director. **Director Dreher** said that he would get that for the Committee and agreed with **Representative Raybould's** comments. He said that was especially true in the Upper Snake River and the Bear River Basin. The rains were unusual in the expanse of area they covered and the frequency in which they came. One storm in the Upper Snake is believed to have saved 1 million acre feet of reservoir storage.

Representative Raybould noted that a proposal will hopefully be developed for the next Committee meeting that the parties concerned can agree to. Until that agreement is reached, it is impossible for the Committee to say whether there will be curtailment or not. **Senator Noh** said that the working groups will be spending a lot of time trying to work out these agreements for presentation to the entire Committee. He explained that another model run has been taken to help with those answers and it is his understanding that the hydrologists are reviewing that data for accuracy.

The meeting was adjourned at 4:45 p.m.